V. 3388

No. 20679

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants,

vs.

C. W. MURCHISON, SIMI VALLEY DEVELOPMENT COMPANY, *et al.*,

Appellees.

APPELLANTS' OPENING BRIEF.

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Preliminary.

This is an appeal, pursuant to leave of this court, from an interlocutory order for a stay and requiring the parties to arbitrate, in an action for damages arising from repudiation by purchasers of an agreement to pay for land deeded to them in 1956 pursuant to that agreement. The litigation is now eight years old; it has been tried once, on a former Complaint; it was appealed and reversed. (*Riess v. Murchison,* 329 F. 2d 635 (C.C.A. 9, 1964), No. 18198). It was retried solely on the question of defendants' petition for arbitration, notwithstanding an Amended Complaint based on *repudiation of the contract* by the defendants was filed after the remittitur from the former appeal.

Meanwhile, circumstances have changed, and the defendants have had the benefit of plaintiffs' land, without substantial payment.

All of these things are said by way of preliminary to emphasize the requirements of justice that—so far as possible on this appeal,—all questions be resolved and this court give its direction in order to expedite the final disposition of this litigation.

Jurisdiction.

This is a diversity case. Appellants are citizens and residents of California (Third Amended Complaint, par. I). Defendant Murchison is a resident of Texas; and the defendant Simi Valley Development Company is a corporation organized under the laws of Delaware having its principal office in Texas (Third Amended Complaint, Pars. II and III). Plaintiffs claim damages in the sum of $892,000 plus interest. (*Id.*, Par. XIX.)

Jurisdiction in the United States District Court is based on Title 28, Section 1332.

Jurisdiction in this court is based on Title 28, Sections 1291 and 1292(b). The order of the District Court (which was appealed from) directs the parties to arbitrate and orders a stay of proceedings until the determination is made by the arbitration.

Although there may have been doubt concerning whether the order of the District Court was appealable, that doubt has been resolved by the order of this court specifically granting appellants leave to appeal. (See Order of this court filed *May 11, 1966.*)

Statement of the Case.

This action was commenced in 1958. It is based on two agreements, which in effect constitute a single contract. [Pltf. Exs. A and B; for the convenience of the court there are reprinted in the Appendix hereof both of

the contracts.] By those contracts appellants sold and conveyed certain "water lands", that is to say, lands with water wells on them, which had been tested by the defendants to ascertain the existence of water. The sale was to defendant Murchison, who, with leave of the plaintiffs, assigned the lands to Simi Valley Development Company ("Simi" herein); the latter corporation without, however, releasing Murchison.

Attention is directed to the fact that plaintiffs deeded their land to Murchison in 1956, but that payment, except for some preliminary sums, has not yet been made. [Find. XVII, Former Record, p. 355.][1]

The Complaint on which the case went to trial once before alleged a breach of the contract in the following terms:

> "In connection therewith, plaintiffs further allege that the promise and covenant of defendant C. W. Murchison to build the reservoir and pipe lines was a promise by the said defendant to diligently proceed with the plan whereby said defendant would be extracting water from the land within said two years so that the purchase money provided for in said First and Second Agreements would become due and payable to plaintiffs herein. Plaintiffs further allege that as a result of said defendant's failure to install said pipe lines and construct

[1]The evidence presented on the first trial was before the District Court on the petition for arbitration [Rep. Tr. of March 9, 1965, p. 57]; this court has made its order, filed Feb. 24, 1966, permitting the use of the former record without the necessity for a repetitious duplication. In order to differentiate between the two records and to facilitate reference where there is occasion to deal with the former record, appellants will use the phrase "Former Record"; references to the proceedings following remittitur from the first appeal will be made in the usual form of "Rep. Tr." and "Clk. Tr."

> said reservoir, it has become impossible for plaintiffs to take and receive from defendants the water from the wellhead of any one or more of the wells located on the 'Water Lands' as the plaintiffs herein might prescribe, as provided for in paragraph 2(b) of the First Agreement."

See also the remarks of Judge Westover, who tried the former case. [Rep. Tr. p. 10, lines 11-15.]

On the former trial, the District Court held that the contract was not susceptible of total breach; judgment was rendered for plaintiffs in the sum of $25,000 constituting damages for defendants' delay in building the reservoir and in extending pipe lines, and the failure to pay for water produced, saved, and sold from the water lands up to April 3, 1962. [Former Record, p. 355, Find. of Fact XVII.]

Both sides appealed the former judgment, and the judgment was reversed. This court determined that the question of the sufficiency of water was material to the case (on the Complaint on which the case was tried), that the contract was one susceptible of total breach (but this court made no determination of that fact), and that unless some conduct of the defendants constituted a waiver or estoppel to arbitration the defendants were entitled to have the question of the sufficiency of the water determined by arbitration. (See Opinion of this court on former appeal.)

After remittitur, plaintiffs, on leave of court, filed an Amended Complaint alleging a repudiation by defendants of the contract, that is, an anticipatory breach. [Clk. Tr., Third Amended Complaint, Par. XIII through XXI, commencing p. 2; and see order of court

granting leave to file, Rep. Tr. of Nov. 2, 1964, p. 3, line 21, to p. 4, line 3, and p. 4, lines 19-22.] Paragraphs XIII through XX allege a number of specific breaches, *including the sale by the defendants of the "water lands"* thus rendering it impossible for the defendants to perform the contract; and paragraph XXI summarizes as follows:

> "Plaintiffs allege that by their conduct, as hereinbefore, alleged, the defendants repudiated and breached the agreement, Exhibits "A" and "B", attached to the original complaint, and further allege that because of defendants failure to perform the terms and conditions of said agreements on their part to be performed, and the repudiation and breach of the agreement, plaintiffs have been damaged in the sum of $892,000.00."

This complaint was never denied or otherwise answered, nor did the defendants file any responsive pleading. Instead the defendants filed the petition for a stay of proceedings and for an order requiring the parties to arbitrate.

Plaintiffs filed an affidavit in response to the petition for arbitration in which plaintiffs stated under oath some of the facts constituting defendants' repudiation. [See Declaration of Stephan Riess, at Clk. Tr. p. 37, particularly p. 9, line 13 of the Declaration through p. 10, line 27.] The Declaration states in part:

> "The later part of 1957, R. C. Adams, Jr.,[2] stated to declarant that defendants became involved financially; that defendants would not proceed with the development of the lands; would not

[2]President of defendant Simi.

install the pipe lines, would not make the monthly payments of $2,000.00 per month, that defendants would do nothing unless plaintiffs would give up the 1/6 of the shares of Simi Valley Development Company, agree to an installation of a pipe line only to Simi lands, as full compliance with the terms of the agreements of September 13, 1955, and June 12, 1956, and accept $9,000.00 as full payment for the balance of the $2,000.00 per month payments."

"That defendants were not obligated to drill and complete water wells; to produce and sell water, develop the lands and install the pipe lines, and that plaintiffs would have to wait until such time as water was sold, and then, would be paid at the rate of 10 cents per gallon when sold." [p. 7, lines 17-22.]

"That the renunciation of the agreements by the defendants and *their acts as set out in the third amended complaint* and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and depriving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956." [p. 10, line 31, to p. 11, line 4.]

The defendants have not, either by affidavit or testimony, denied any of the quoted statements of Riess' Declaration. (See affidavit of Costin, particularly at page 5 thereof, in part confirming Riess' declaration.)

Hearings were held on defendants' petition and the plaintiffs' controverting declarations. The trial court largely restricted evidence to the issue of waiver of the

right to arbitration by defendants, and estoppel by defendants to claim arbitration.[3]

The plaintiffs' evidence included testimony, undenied by defendants, showing repudiation and abandonment of the contract by the defendants. Nevertheless, the transcript of the hearing leaves the impression that the trial court did not give consideration to the effect of defendants' repudiation of the contract on the defendants' right to arbitrate. The confusion is compounded by the failure of the trial court to make findings. Apparently the District Court was of the opinion that since the defendants had commenced to perform by making payments prior to the first trial, there could not be a total breach of the contract. [*Cf.*, remarks of Judge Westover, p. 559, lines 6-21; and p. 576, lines 17-19.] Plaintiffs' counsel presented the question of repudiation as related to the claim for arbitration at page 560, lines 13-18, as follows:

> "MR. SCHWARTZ: No, your Honor. It couldn't be determined by the arbitrators except for the fact, as pointed out previously, and as I point out again, whether they are entitled to arbitration will depend upon the conduct of the defendants and whether they waived it, whether they repudiated the contract."

Notwithstanding this statement, and others in plaintiffs' Memorandum of Authorities on the question of defendants' loss of the right to seek arbitration by reason of defendants' repudiation [Clk. Tr. commencing

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[3]"The Court: He [defendant Murchison] is entitled to arbitration unless it has been waived" [Rep. Tr. p. 558] ". . . or he has been estopped." [Rep. Tr. p. 559, lines 1-3.]

at p. 152, particularly p. 23 of the Memorandum; see also Rep. Tr. p. 616, line 24, to p. 617, line 4], it appears probable that the District Court did not consider anything other than the question of an express waiver and estoppel, notwithstanding there was undenied evidence of defendants' repudiation.

Appellants contend there was substantial, undenied evidence of repudiation by the defendants (which will be summarized hereinafter under an appropriate heading in this brief) and that such repudiation deprived the defendants of the right to arbitrate.

Specification of Errors.

1. The District Court erred in failing to limit the arbitration provisions to determining the sufficiency of the water as a prerequisite for defendants' obligation to build a reservoir and to extend pipe lines.

2. The trial court erred in failing to determine the issue of defendants' alleged repudiation before hearing and ordering arbitration.

3. The District Court erred in failing to determine, on the record made, that defendants had repudiated their obligations under the contract.

4. The District Court erred in failing to determine that defendants had abandoned the contract.

5. The District Court erred in ordering arbitration.

6. The District Court erred in failing to make Findings of Fact in support of its order staying proceedings.

7. The District Court erred in determining that defendants were not in default.

Appellants' Contentions.

1. (a) The clause providing for arbitration [par. (f) of the 1956 agreement, Ex. B, referring to par. 3 of the 1955 agreement, Ex. A] is limited in its application to a claimed breach by reason of the failure of the defendants to extend water lines and build a reservoir. The trial court erred in holding that arbitration was applicable to the claimed repudiation of the contract.

(b) If there was any doubt concerning the application of the arbitration clause, the trial court erred in failing to consider and to determine the meaning.

2. The defendants repudiated the contract; this repudiation deprived the defendants of the benefits of the contract, and in particular, deprived the defendants of the right to demand arbitration; the trial court erred in ordering arbitration.

3. The record made below shows that defendants repudiated their obligations under the contract and were therefore, not entitled to arbitration.

4. The order appealed from stayed all proceedings and thus constituted an injunction; the trial court erred in failing to make findings of fact.

5. In any event, the order is erroneous in determining that defendants were not in default; such a conclusion predetermines the consequences of the arbitration because if it be the law of the case that defendants are not in default, there is no need to arbitrate the question of the sufficiency of the water. The issue of defendants' default was not considered; if the error is not corrected, the order will improperly prejudice the plaintiffs in subsequent proceedings in this case.

ARGUMENT.

I.

A. The Arbitration Clause [Paragraph (f) of the 1956 Agreement, Exhibit B] Is Limited to Defendants' Obligation to Install Reservoirs and to Extend Pipe Lines; the Trial Court Erred in Failing so to Limit the Clause.

The Third Amended Complaint which was before the court at the time of filing of the petition for stay and arbitration was based on defendants' repudiation of the contract. It is well established, and will be presented under a separate heading, that one who repudiates a contract cannot have any further benefits of the contract. Under the present heading appellants urge that the arbitration provisions of the contract relate only to defendants' obligation to construct a reservoir and pipe lines.

The arbitration provisions are contained in the 1956 agreement.

> "(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, *as contemplated in Paragraph 3 of the Letter Agreement,* that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final." (Italics added.)

Paragraph 3 of the agreement of 1955 reads as follows:

> "Subject to the physical ability of the well or wells now or hereafter located on the Water Lands

> to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract." (And see Statement of Facts in Opinion of this Court on former appeal.)

The words italicized in paragraph (f) would be of no significance if arbitration were contemplated in the event of *any* question concerning the sufficiency of water. The italicized words have a function if arbitration is applicable only as a prerequisite to the provisions of Paragraph 3 of the 1955 agreement, that is, to defendants' obligation to extend pipe lines and to build reservoirs.

The situation is governed by portions of California Civil Code §1641, which says: "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable. . . ."

In *Lawrence Block Co. v. Palston,* 123 Cal. App. 2d 300, at page 310, the court said:

> "A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant."

To the same effect are also:

Harris v. Klure, 205 Cal. App. 2d 574, 578 (1962).

Pico Citizens Bank v. Tafco, Inc., 165 Cal. App. 2d 739, where the court said, at page 746:

> "As said in *Hyatt v. Allen,* 54 Cal. 353, 358, quoted with approval in *Wagner v. Shapona* (1954), 123 Cal. App. 2d 451, 461 [267 P. 2d 378]:
>
> '. . . it is our duty to so construe every provision of a written instrument as to give force and effect, not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity.' "

Further to illustrate appellants' contention in this respect there is quoted below the relevant portions of paragraph (f) of the 1956 agreement *omitting* the limiting reference to paragraph 3 of the 1955 agreement:

> "(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, . . . that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final."

If the limiting clause were not contained in the contract, arbitration could be required in case there were any disagreement concerning sufficiency of the water; and the

meaning of paragraph (f) would be completely changed. [See remarks of Judge Westover, Rep. Tr. Vol. 3, p. 353, lines 7-9.]

The attention of this court is respectfully directed to paragraph 2 of the 1955 agreement. [Pltf. Ex. A.] Subparagraph (a) of paragraph 2 is not subject to arbitration. Furthermore, subparagraph (b) of the same paragraph is not subject to arbitration; indeed paragraph 4 provides for giving security to fulfill defendants' obligations under paragraph 2(b). Neither are paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 made subject to arbitration. Paragraph 3 of the 1955 agreement is obviously different from the remaining obligations of the defendants. The obligations of the defendants under that paragraph are "*Subject to* . . ."; and paragraph (f) of the 1956 agreement refers to paragraph 3 of the 1955 agreement and provides for arbitration.

Appellants urge that respondents' obligations under all of the paragraphs of the 1955 agreement were not subject to arbitration, but only a claim of sufficiency of water as a prerequisite to the defendants' obligation to build reservoirs and pipe lines under paragraph (3) of the 1955 agreement.

Defendant Murchison's right to reconvey the lands and thus be relieved of further obligation is not subject to arbitration; indeed the opposite is provided for, because paragraph (h) of the 1956 agreement provides that Murchison may reconvey the lands "if in my [Murchison's] opinion" the wells are no longer capable of producing sufficient water. Such a right, based on one party's opinion as to the productivity of the wells, is patently inconsistent with the requirement for arbitration whenever such a difference is claimed to exist. [See

admission of defendants' counsel, Rep. Tr. Vol. 4, p. 440, line 20, to p. 441, line 2.]

This branch of the argument may become irrelevant if this court agrees that on a complaint based on repudiation of a contract, the issue of repudiation must be determined before a party can have arbitration; if the defendants have repudiated plaintiffs, as alleged and, as appellants urge, has been proved, the defendants cannot have arbitration. The reason is that, following a repudiation by the defendants, the contract has validity only to measure damages. It does not exist as an agreement under which to submit an issue to arbitration.

But the point may become relevant if the trial court should determine there were breaches by the defendants (other than a breach under paragraph 3), but not a repudiation. The trial court should then have the benefit of this court's direction with respect to the defendants' right to arbitration. Appellants urge that arbitration is limited to determining the adequacy of the water as a prerequisite to the existence of defendants' obligations under paragraph 3 (the duty to build a reservoir and to extend pipe lines) and not otherwise. In any event, arbitration cannot decide whether there has been a repudiation, because this question goes to the *effective* life of the contract.

6 Williston on Contracts (1920, Rev. Ed.), page 5369;

Friedlander v. Stanley Productions, 24 Cal. App. 2d 677;

Stetson v. Orland Oil Synd. (1940), 42 Cal. App. 2d 139;

Hanes v. Coffee (1931), 212 Cal. 777.

The court erred in ordering arbitration in the face of proof of repudiation or at the very least in ordering arbitration before determining the issue of repudiation.

B. If There Were Any Doubt Concerning the Meaning and the Application of the Arbitration Provision, the Court Should Have Taken Evidence to Resolve the Doubt.

In approaching this question of construing the contract appellants wish to point out:

(i) If the contract was repudiated by defendant, there was no need for construction of this contract, because defendants could not have the benefits of the contract, specifically, defendants could not require arbitration.

(ii) If the contract survives, that is, if this court finds that defendants have not repudiated the contract, and if notwithstanding the apparent clarity of the language there is doubt concerning the meaning of the provisions relating to arbitration, the trial court should have resolved that doubt by taking extrinsic evidence.

Appellants do not contend that the agreement was ambiguous. The defendants make the present argument out of an excess of caution, in the event this court should decide that the agreement is unclear concerning arbitration. If this court should so determine, it should also conclude that it was the duty of the District Court to have received evidence and to have made a determination concerning the application of the arbitration provisions in order to resolve that doubt.

In *Shipley v. Pittsburgh & L.E.R. Co.* (U.S.D.C., W.D. Pa., 1949), 83 Fed. Supp. 722 at 741, the court said:

> "A situation exists where the contracts are capable of being understood in more senses than one; they are obscure in meaning, through indefiniteness of expression. Since the contracts are ambiguous, that is, the language used is reasonably susceptible of more than one meaning, *it is the duty of the court* to determine the intent of the parties." (Italics ours.)

Likewise in *Petro v. Ohio Casualty Co.* (U.S.D.C., S.D. Cal., 1950), 95 Fed. Supp. 59 at page 61, the court said:

> "When, of course, a contract is uncertain and ambiguous it becomes *the duty of the court* to determine, if possible, what is intended, but in the absence of such ambiguity and uncertainty, and when the contract is in all respects valid, the power of the court is limited to enforcing such contract according to its terms." (Italics ours.)

The point appears obvious. Nevertheless there is no indication in the proceedings below that the court applied this rule. Apparently the District Court thought itself bound by the decision of this court rendered on a complaint for breach of defendants' obligation to build a reservoir, even though a new complaint pleading repudiation had been filed after remittitur following the former appeal. It is respectfully urged that the District Court erred in directing arbitration.

II.

A. Respondents Repudiated Their Contract With Appellants, and Thus Lost the Right to Require Arbitration.

The Complaint which the court at the time of the petition for stay and requiring arbitration was filed after leave of court on November 2, 1964. That Complaint alleged that the defendants had repudiated their contract. [Third Amended Complaint, Clk. Tr. commencing at p. 2, at pp. 14, 15 and 17, summarized in paragraph XXI of said Complaint.] Defendants have never filed a denial, an Answer, or other responsive pleading to that complaint. Instead, defendants filed a petition for stay of proceedings and arbitration. [Clk. Tr. p. 22 *et seq.*]

Appellant's affidavit opposing the motion, contains the following statements:

> "Declarant alleges that at a meeting, in early 1958, at which were present the plaintiffs: Glen Costin, then president of Simi Valley Development Company, Francis C. Cobb, then attorney for plaintiffs, and H. F. Rosemund. Mr. Cobb and Mr. Costin said that, unless plaintiffs:
>
> a) Delivered to defendants their one-sixth of the shares of stock of the Simi Valley Development Company;
>
> b) That plaintiffs accept one-half of the defaulted payments in satisfaction of that obligation;
>
> c) That plaintiff accept construction of a pipeline to the Smith land as compliance with construction obligations of the contract;

d) That if plaintiffs did not accept the proposal, defendants would not make the balance of payments; would not commence construction of the reservoir and pipelines by June 12, 1958; would never construct the pipelines and reservoir;

e) That plaintiffs would have to go to court and defendants would keep them litigating for ten years until plaintiffs could no longer afford to fight and plaintiffs would have nothing left.

f) That defendants can sit and wait until metropolitan water comes in, perhaps in three years, and that plaintiffs would be frozen out and get nothing.

g) That unless plaintiffs agreed defendants would make tests of the wells in such a way as to show insufficiency, and then claim their performance was executed.

That plaintiffs thereupon requested that the water lands be returned to them. That defendants refused.

"Declarant further states that early in April 1958, defendants removed the 360 horse-power Cummins engine from Well No. 2, and removed the 14" pump bowls. That a transformer was installed by defendants to furnish power to the motor on Well No. 2. That the transformer capacity was insufficient for a motor or more than 150 horsepower. That 8" pump bowls were installed and a 150 horse-power motor. That the productive capacity of Well No. 2 was greatly reduced because of lack of power and pump capacity.

"Declarant alleges: That defendants repudiated and breached the agreements of September 13, 1955 and June 12, 1956. That by their acts and conduct, defendants prevented and made it impossible to perform test of the wells. That the acts of defendants were inconsistent with the agreement to submit the controversy to arbitration and constituted a breach of the agreements and right to arbitration.

"That by their conduct, the defendants so changed the condition of the wells as to make testing impossible, unfair and inequitable. That the defendants are not in court with clean hands.

"That the renunciation of the agreements by the defendants and *their acts as set out in the third amended complaint* and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and depriving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956."

"That defendants were not obligated to drill and complete water wells; to produce and sell water, develop the lands and install the pipe lines, and that plaintiffs would have to wait until such time as water was sold, and then, would be paid at the rate of 10 cents per gallon when sold."

. . .

"That the renunciation of the agreements by the defendants and their acts as set out in the third amended complaint and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and de-

priving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956." [Clk. Tr. p. 37, to p. 39, line 13.]

In reply to plaintiff's Declaration, the defendants filed the Declaration of John C. Willard, an affidavit of Sherman Royce, and an affidavit of Glen Costin. The Declaration and affidavit of Willard and Royce consist for the most part of opinions concerning the productivity in water of the "water lands". The Declaration of Costin is largely consistent with the Declaration of plaintiff Stephan Riess. Costin says that $108,000 has been paid to Riess, and that various other sums were paid with respect to drilling wells and obtaining reports concerning the amount of water available. Costin further says that on April 13, 1957, Simi entered into an agreement of sale with Subdivision Finance Corporation whereby the latter was to purchase all of the "fee property" owned by Simi, and was to perform all of Simi's and Murchison's obligations; but that Subdivision Finance Corporation defaulted. Costin goes on to say: "That by reason of the assurances and contracts of commitment by Subdivision Finance Corporation to perform, Simi Valley Development Co. delayed the commencement of testing said wells and engineering the pipe lines until the default by Subdivision Finance Corporation." [Affidavit of Costin, p. 5.]

Costin's affidavit further goes on the make "Reply to Specific Paragraphs of Declaration of Stephan Riess". In this branch of Costin's affidavit, Costin says that a request was made of Riess that he postpone the requirements of the commencement of the pipe lines until a master plan had been completed. He further says that it was Simi and not Murchison who removed

the pumping unit that was attached to a Diesel engine because engineers advised that the Diesel engine inadequate. Other statements in Costin's affidavit reiterate the defendants' contention that the water which could be produced from the water lands would be inadequate for the development of the entire 1600 acres of Montgomery lands.

But nowhere in Costin's affidavit is there a denial of the statements made in Riess' affidavit concerning the abandonment of the wells, the capping of the wells by the defendant, and the repudiation of the contract. On the contrary, Costin's affidavit says in substance that Simi had determined that the water supply was inadequate for the development of the entire 1600 acres and that Simi accordingly was under no obligation to perform any other portion of the agreement. Thus, Costin's affidavit is in effect the same kind of affidavit as was filed by the defendant in *Bertero v. Superior Court,* 216 Cal. App. 2d 213 (1963), which was cited by this court in its opinion on the earlier appeal, and which the District Court of Appeal of the State of California held was a repudiation of the contract.

The District Court apparently concluded it would not determine the issue respecting arbitration solely on the basis of affidavits but would take testimony. [Rep. Tr. p. 32, lines 3-7 (Dec. 14, 1964).] Thereupon defendants put on testimony to the following effect: an expert, knowing the county requirements for minimum amounts of water, could examine the land which was to be served with the water, and then examine the records of the drillings that had been made on the water lands in prior years (and possibly by drilling additional wells), could determine whether the water lands could produce sufficient water to serve the lands.

Plaintiffs put on evidence of repudiation substantially similar to that in their affidavit:

"Mr. Adams[4] said, 'I don't think so. Mr. Murchison is out of this now. We are selling. We have all the water we want. We are going to shut down as of today.'

THE COURT: Did he explain in any way what he meant by 'We have all the water we want'?

THE WITNESS: He said, 'We got all the water we need here.'

I said, 'Put the pumps in all the wells and let's have it.'

He says, 'We don't need more than No. 2. We are satisfied. We don't want to drill any longer. The rigs go out. I have no money. Murchison closed the check book.'" [Rep. Tr. Vol. 2, p. 275.]

"A. At that time I[5] was bluntly told that unless I would take half of the money due that Murchison agreed to pay, who was out of this now, I would get myself litigated, a belly full of litigation, until I am broke and it would last 10 years and I will never get anywhere.

Q. Was there anything said at that time about your shares in Simi Valley Development Company? A. Yes.

Q. Were any terms told you as to what you would have to do? A. Yes.

Q. Will you state what was said? A. I was told that I got to throw in my one-sixth interest in the lands which I held by reason of the shares,

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[4]President of defendant Simi Valley Development Co.

[5]Plaintiff Stephan Riess.

for nothing, that I got to be satisfied with half of the money that is called for under the agreement, and that I must agree that the pipelines shall only be put on the Smith property instead of on the Montgomery parcel, or else they will stop me dead cold, I cannot use my own water, I won't have a way out with it." [Rep. Tr. Vol. 3, pp. 311-312.]

"Q. Mr. Riess, did you have any other conversations at other times with the agents or representatives of the defendants involving threats? A. I did.

Q. Can you tell us the time the conversation took place, when? A. That was in my house in 1957, in the latter part of the year. I had steam heat on at home. That is why I know it was later in the year. Mr. Cobb and Mr. Costin came back again to discuss this problem of giving them my one-sixth interest and making a new deal.

Q. Just a moment. The answer was 'yes'? A. Yes.

Q. All right. You said it was in your house? A. Yes, right in Santa Barbara.

Q. In Santa Barbara. Now, who was present? A. Mr. Cobb, Mrs. Riess, and myself, and Mr. Costin.

Q. And what threat was made at that time? A. At that time I was told that this is their last offer they would give me, if I don't accept that, 'Go ahead and sue. We will take care of you.' That's the whole story.

Q. Was that all the conversation? A. Just about all of it. There was agreement that I

wouldn't. They[6] told my wife, 'Now, Mrs. Riess, your husband ought to have a little bit more sense. He is just going to get broke, lose everything he has, and you will lose your beautiful home here.' " [Rep. Tr. Vol. 3, pp. 313-314.]

"A. I said to Mr. Costin,[7] 'What are you now going to do? Am I going to get water down the canyon and get some money for my water.'

Then he said, 'You are not going to get any money, you had it, unless you are going to turn over your sixth to us. Then we will sit down and talk business.' " [Rep. Tr. Vol. 4, p. 472.]

"A. We[8] were told that the first thing, the first demand that I must meet before they get any further is to turn over my one-sixth; that otherwise they will not proceed, they won't put pumps in the wells, they won't put the power on, and I simply will get nowhere." [Rep. Tr. Vol. 4, p. 474.]

"Q. What, if anything, did Mr. Costin[9] say about delivering water to you? A. He wouldn't give me any. He said—

Q. Mr. Riess, we are not asking you for a conclusion. A. He said, 'No, I won't give you any'—

Q. Just a minute. What did he say to you?" [Rep. Tr. Vol. 4, p. 476.]

"A. He[10] said, 'You will never get any. You can get your wells back when Metropolitan is in,'

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[6]Attorney and officer of defendant Simi Valley Development Co.

[7]Officer of defendant Simi Valley Development Co.

[8]Plaintiffs Stephan and Thelma McKinney Riess.

[9]Officer of defendant Simi Valley Development Co.

[10]Mr. Costin, President of defendant Simi Valley Development Co.

he said. 'Let the public then find its own water. We are not interested in it.'" [Rep. Tr. Vol. 4, p. 477.]

"THE WITNESS: At that time again he[11] told me that I will never get any water." [Rep. Tr. Vol. 4, p. 478.]

"Q. And what if anything did he[12] say about putting a pump on No. 0 or No. 1 well? A. Just refused.

Q. What? A. He just refused.

Q. You say he refused. What did he say? A. He said, 'Never.' He said, 'Never.'" [Rep. Tr. Vol. 4, p. 480.]

"THE WITNESS:[13] Yes. Francis Cobb[14] told me that if I ever want to get any money or water or money for water I have to rewrite an agreement with Simi Valley Development Company because Murchison is out of it anyhow, that I must agree to sell water to them, take all my wells back, and give them a priority call on 750 gallons a minute, that he came to me to try to get this thing out of the way as a neighbor, rather, which he was up there.

Q. Is that all that was said at that time? A. He said, 'This man will never agree to go on in Dallas, they will hire men and expert you out of business. They will prove that you haven't got the water. What can you do?'

Q. Was there anything said in that conversation about putting any of the wells back in produc-

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[11]Mr. Costin, President of Simi Valley Development Co.

[12]Mr. Costin, President of Simi Valley Development Co.

[13]Stephan Riess.

[14]Attorney for defendant Simi Valley Development Co.

tion? A. He said, 'They never will. You better take everything back and sell us water.'

Q. And was anything said in that conversation about your having to give up your one-sixth of the shares? A. That was conditional, of course, every time.

Q. Just answer the question. A. Yes, it was.

Q. And what was said? A. It was said that unless I first give up my one-sixth, there will be no discussion possible." [Rep. Tr. Vol. 4, pp. 495-496.]

This court, on the former appeal, stated:

"Subsequently, during certain meetings between the sellers and the buyers, and in certain correspondence and conversations between them, concerning future performance by the buyers under the contract, the buyers expressed some unwillingness to comply exactly with the terms of the contract. Whether the buyers actually repudiated the contract is in dispute.

". . .

"The buyers have not paid the sellers at the contract rate for water produced, saved, and sold by them from the water lands, though between the consummation date and the date of trial they did produce, save, and sell water therefrom.

"The buyers have never exercised their right under the contract to terminate the contract for insufficiency of the water on the water lands."

". . .

"The District Court then proceeded to make findings of fact and conclusions of law. It held

> that the buyers committed partial breaches of the contract: the court held that the buyers breached by paying only $30,000, instead of $48,000, during the two years immediately following the consummation date; in this connection, it held that the voluntary payments of $28,000 made prior to the consummation date should be credited against monies to become due under the contract after trial, not against the $48,000 due during such first two years. . . . The court further held that the buyers breached by failing to pay the sellers at the contract rate for water produced, saved, and sold by them from the water lands." (329 F. 2d 635, 638-639.)

In view of the fact that all of the proceedings of the earlier hearing before the District Court were ordered to be before the District Court on the Petition for Arbitration [Rep. Tr. p. 57], it is well to state that in addition to the partial breaches previously found by the District Court and affirmed by the Circuit Court of Appeal, the defendants insisted upon a return of the one-sixth interest in Simi [Rep. Tr. Vol. 4, pp. 472, *et seq.*], the bringing in of metropolitan water in 1963 and 1964 [Rep. Tr. Vol. 1, p. 141], the abandonment of the wells since approximately 1964 [Rep. Tr. Vol. 1, p. 118], the fact that defendants pulled out the pumping equipment [Rep. Tr. Vol. 2, pp. 208-234, 242, 252, 272, 275], and the unequivocal statements of the agents that they did not need the wells, that defendant Murchison was out of the matter now, that the defendants were selling, that they had all the water they wanted, and were going to shut down immediately, that defendant Murchison "closed the checkbook" [Rep. Tr. Vol. 4, pp. 495-496], the statement of defendants' counsel Cobb,

that the agreement must be rewritten if the plaintiffs were to get any water — all of these facts show the clear intention of the defendants not to resume performance unless and until the plaintiffs return their one-sixth interest in Simi and accepted only one-half of the $18,000 due from monthly instalments unpaid.

To be effective, an offer must be free of conditions which the offeree is not bound to perform. (California Civil Code, §1494); and see *K. & M. Inc. v. LeCuyer* (1951), 107 Cal. App. 2d 710, 717.) The various offers made by defendant Simi were either for less than was due or were made conditioned on plaintiffs' giving up their shares of stock in that corporation. Such offers do not, of course, constitute adequate tenders of performance. In fact, defendants stated they intended not to perform.

In view of defendants' repudiation, plaintiffs were relieved of making further requests for payment in water.

> ". . . Where failure of a party to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise — the duty of such other party becomes independent of the performance of the condition . . .". (Am. Law Inst., Restatement of Contracts, §306, quoted in *Grivas v. Alianza Compania Armadora S.A.* (C.C.A. 2, 1960), 276 F. 2d 822, at p. 828.)

See also, California Civil Code, §1440; *Tatum v. Levi* (1931), 117 Cal. App. 83 at page 89; *Heulen v. Stuart* (1923), 191 Cal. 562 at page 569; *Walker v. Harbor*

Business Blocks (1919), 181 Cal. 773 at page 778; *Placid Oil Co. v. Humphrey* (D.C. Tex., 1956), aff'd 244 F. 2d 184.

It must be remembered that since the commencement of this lawsuit and while defendants were in default, there has occurred a critical change of condition. The relevant lands, which were intended to have been served by the water from the plaintiffs' water lands, were in December 1963 connected with water from the Los Angeles Metropolitan Water District, and water was actually pumped to these lands in January, 1964. [Rep. Tr. Vol. 4, p. 461, lines 16-20; p. 501, lines 3-4.] The provisions of the contract for the payment of the purchase price by delivery of water have accordingly been rendered substantially valueless by defendants' breaches and delays. The undenied testimony by plaintiffs is that the defendants knew what they were doing by the delay, and continued to delay because of the oppressive character of requiring the plaintiffs to wait.

However, because defendants have repudiated the contract, they cannot now benefit from its terms defining the means of payment; if this court finds repudiation, defendants must pay in money damages. At this point we deal with the effect of repudiation with defendants request for arbitration.

It should first be observed that the evidence above quoted has not been denied; that evidence stands uncontradicted, the defendants having allowed the matter to be submitted for decision without undertaking to

meet the evidence of repudiation. On this record, appellants urge that the defendants are bound by the testimony showing the defendants' repudiation.

The law is clear that a party to a contract who repudiates it, cannot claim the benefit of a provision of the contract allowing arbitration.

In *Grunwald-Marx, Inc. v. Los Angeles Joint Board, et al.,* 192 Cal. App. 2d 268 at p. 278, the court said:

> " 'Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and cannot insist on the remedy by arbitration . . .' "

4 Corbin on Contracts, Section 970 (1951):

> "If the time for the defendant's promised performance was not definitely fixed in the contract, but the defendant promised to perform whenever requested by the plaintiff, or as soon as the plaintiff should have performed certain conditions precedent, their repudiation by the defendant is regarded by all courts without exception as a breach of the contract, creating an immediate right of action. Inasmuch as the conditions precedent to

the defendant's duly of immediate performance had not been performed at the time of the repudiation, it seems clear that their repudiation was an anticipatory one, and that it no more constituted a non-performance of the declarant's promise than does a repudiation antecedent to a definitely specified date for the performance. All agree however, that the defendant's repudiation excuses the plaintiff from performing conditions precedent; and therefore, it is said that the defendant's performance becomes instantly due, and that there is a breach by non-performance in addition to the defendant's repudiation."

4 Corbin on Contracts, Section 954 (1951), states:

"How were the rights of the parties affected and what is the character of the breach when a failure to render some performance when due is accompanied by a repudiation of the contractual obligations? In the first place, such repudiation is called an 'anticipatory breach' when it occurs before any performance by the repudiator is actually due . . . Suppose next that the contract requires performance in installments or continues for some period in that there has been such a partial failure of performance as justifies immediate action for partial breach. If this partial breach is accompanied by repudiation of the contractual obligation such repudiation is anticipatory with respect to the performances that are not yet due. In most cases, the repudiator is now regarded as having committed a 'total' breach, justifying immediate action for the remedies appropriate thereto."

17A Corpus Juris Secundum, Contracts, Section 472(1), page 652, says:

> "On renunciation or repudiation of an executory contract by one party, the other party, under most authorities, may rescind the contract, or treat it as binding until a time for performance arrives, or sue *immediately* for the anticipatory breach."

In this case, the actual partial breaches, are: (1) failure to pay $18,000 for nine monthly installments; (2) failure to pay for water pumped, sold, and delivered; (3) destroying the wells; (4) selling the water lands [Third Amended Complaint, par. XX, incorporated in Riess' Declaration, p. 10, lines 31 *et seq.*] These breaches were coupled with a repudiation of the contract by words and acts. The actual breaches coupled with the anticipatory repudiation equals a total breach and therefore deprives the defendants of the right to require arbitration.

6A Corbin on Contracts, Section 1443 (1962), states:

> "Although one party cannot by himself 'rescind' a contract, he can wrongfully 'repudiate' it . . . Suppose first he repudiates the agreement to arbitrate itself. By such a repudiation, he does not deprive the other party of his right to arbitration . . . But such a repudiator has himself no right to arbitration. . . ."

Caughlin v. Blair (1953), 41 Cal. 2d 587, appears close to the case at bar. In the cited case plaintiffs bought a lot from defendants for the stated purpose of building a residence on it. Defendants agreed to pave the street in order to provide access to the lot, and to install gas and electric lines to the property within a

year from the agreement. On the date performance was due, defendants had neither installed gas or electric lines nor paved the road. Plaintiffs requested performance, and then filed suit for total breach of the contract. At some time in the year after performance was due, defendants installed a fraction of the road, but did not put in the electric and gas lines; however, after suit was filed, some part of the lines were put in. In affirming a portion of the judgment for plaintiffs, the court said:

> "The distinction defendants would draw between a permanent and a temporary injury has no relevance in a case involving a total breach of contract. In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective." (*Id.*, p. 598.)
>
> . . .
>
> "At that time performance was one year overdue. By seeking damages for the difference in the value of their property with and without performance, plaintiffs gave notice that they would no longer treat defendants' continued failure to perform as a partial breach. Defendants could not reasonably expect plaintiffs to continue indefinitely to treat the breach as partial. Even if a breach might be considered partial at the time performance is due, there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here." (at p. 599.)
>
> . . .
>
> "Despite repeated requests by plaintiffs, defendants had not installed the improvements called for

> by the contract. It was uncertain when if ever they would do so. Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience. Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating defendants' nonperformance as a total breach of the contract." (pp. 599-600.)

See also: *Bertero v. Superior Court* (1963), 216 Cal. App. 2d 213; *Local 659 v. Color Corporation* (1956), 47 Cal. 2d at page 189; Corbin on Contracts, Sec. 1443.

And see: *American Type, etc. Co. v. Packer* (1900), 130 Cal. 459, 463, 62 Pac. 744; *Clarke Contracting Co. v. City of New York,* 229 N.Y. 413, 419-420, 128 N.E. 241; *Helger Corp. v. Warner's Features,* 222 N.Y. 449, 453-454, 119 N.E. 113; *Gold Mining and Water Co. v. Swinerton* (1943), 23 Cal. 2d 19, 142 P. 2d 22; Corbin on Contracts, Section 946.

Appellants accordingly urge that the District Court erred:

(a) In failing to determine the issue of repudiation before hearing and ordering the arbitration;

(b) In the hearing for arbitration, in failing to consider the effect of repudiation; and

(c) In failing to determine, on the record below, that defendants had repudiated the contract.

B. The Defendants Failed and Refused to Develop the Water Lands, Abandoned Drilling Operations, and Thus Frustrated the Purpose of the Contract and Abandoned the Contract; by This Conduct Defendants Deprived Themselves of the Right to Require Arbitration.

The agreed contract price for the water lands was $1,000,000. Of this amount defendants have paid $108,000 ($50,000 in 1956 and $2,000 per month for fourteen months; see Affidavit of Costin). As to the remainder, defendant Murchison (and his assignee) had an election either to pay in water derived from the water lands or in cash. [Ex. A, Par. 2(b), the 1955 agreement.] The agreement contemplated the development of the Montgomery lands and other lands and also contemplated that these lands would be supplied with water from the water lands. Following are excerpts from Exhibit A (the 1955 agreement) which are pertinent here:

> "This letter agreement shall serve to evidence and confirm the basic general understandings and agreements entered into between us this date relative to the acquisition by me, or my nominees, designees or assignees (and it is understood that throughout this letter all references to me shall include my nominees, designees and assignees, if any), of certain lands now owned by you and your wife and the water rights pertaining thereto and the water wells situated thereon and the participation by you and your wife and Len Acton and Guy L. Mann, collectively, in the proportion of one-half by you and your wife and one-half by Messrs. Acton and Mann, in (a) the *lands or the income*

and profits therefrom located in Ventura County, California which I have contracted, by contract dated August 26, 1955, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi [*sic*] Valley of California." (Italics ours.)

"Our basic agreements and understandings are in general as follows:

1. You have represented and hereby do represent that you and your wife own good and merchantable title to certain lands in Ventura County, California, comprising [*sic*] approximately 300 lots plus approximately three and one-half acres upon a portion of which there is presently located one or more wells capable of producing many millions of gallons of commercially pure water (the portion of which lands upon which such well or wells are located are hereinafter referred to as the 'Water Lands'). . . . With respect to such expected lands you shall also assign and convey to us all water rights appurtenant to same. . . .

2. In consideration for such lands and water rights I agree to:

(a) Grant unto you, your wife, Len Acton and Guy L. Mann, collectively, but in the proportions of one-half to you and your wife and one-half to Messrs. Acton and Mann, a one-third participation in the lands of the net profits therefrom covered by the aforesaid contract between myself and M. Laurence Montgomery (hereinafter called the 'Montgomery Lands') together with a like interest or participation in such other lands as I might

hereafter acquired within the said Semi [*sic*] Valley as may be serviced by water from wells now or hereafter located upon the Water Lands. This interest or participation in such lands shall be either in the character of an undivided one-third title to the fee thereof or the right to receive one-third of the net profits to be derived from the operation, development and/or sale thereof or an interest in a limited partnership which would own such lands. . . . In any event, however, it is agreed that regardless of the nature or character of the interest and participation of yourself, your wife and Messrs. Acton and Mann in said lands or in the net profits therefrom, *I shall have full discretionary rights of management, control and disposition of such lands* regardless of the character of yours, your wife's and Messrs. Acton's and Mann's said rights and interests therein." (Italics ours.)

The last quoted portion (Par. 2(a)) was deleted by the 1956 agreement, which substituted the following provision of Exhibit B:

"(d) Paragraph 2(a) of the aforesaid Letter Agreement shall be stricken in its entirety and all other provisions of the Letter Agreement relating to the interests or undivided profit rights of yourself and Mrs. Riess and Messrs. Len Acton and Guy Mann in the Montgomery lands and in other lands to be acquired by me in the area shall be eliminated and you and Mrs. Riess and Mr. Acton and Mr. Mann shall surrender all of such rights and interests in consideration of the transfer to each of you of 1/12th of the common stock of Simi Valley Development Company."

Thus it was made apparent that defendant Simi Valley Development Company became the vehicle for carrying out defendant Murchison's obligations without, however, relieving defendant Murchison of those obligations.

Exhibit A (the 1955 agreement) further provided:

> "(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the balance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to

you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. . . .

3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as *adequately to service the lands covered by the Montgomery Contract* with an adequate supply of water, *contemplating that such lands will be developed for residential and industrial usages,* I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands . . ." (Italics ours.)

(B) Neither you, your wife nor Messrs. Mann or Acton shall be personally liable or obligated for any expenses or costs attributable to or incurred in connection with the acquisition, operation, development, maintenance or sale or other disposition of the Montgomery Lands or any of the additional lands in the Semi [*sic*] Valley which might here-

after be acquired and which are covered by the provisions of paragraph 2(a) above, but the participation of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, shall collectively be charged with one-third of all such costs and expenses . . . and it is further agreed that all obligations on my part hereunder are conditional upon my being satisfied: . . . (b) that upon my becoming the owner of the Water Lands, I shall have the exclusive right to appropriate to such lawful uses and purposes as I might designate or desire all water that may be produced from wells now or hereafter located upon said lands particularly, but not limited to, the right of dedication of the preferential rights to such water to uses thereof on (or for the benefit of) the Montgomery Lands to the exclusion of all other uses. . . .

8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b)."

Exhibit B (the 1956 agreement) further provided:

"You and Mrs. Riess shall immediately execute and deliver to me, and I shall accept, a general warranty deed covering the lands referred to in said

> Letter Agreement as the 'Water Lands', together with all wells, water rights and other improvements and appurtenances thereon, which said lands are described in Exhibit A attached hereto. The monies which I have previously caused to be paid to you, aggregating the sum of $78,000.00, is, and shall be, of course, a credit on the purchase price of said water lands and other properties. . . .
>
> (h) It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, *in my opinion,* the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint." (Italics ours.)

Appellants contend that these contracts necessarily contemplated the development of the described land by the use of water derived from the Water Lands which plaintiffs had conveyed. Particularly, appellants rely on the obligation of the defendants to pay the agreed price, the statement that the parties contemplated developing certain described lands, and the further agreement that defendant Murchison (and his assignee) were to have complete control of the operations. One other element deserves mention: the fact that the agreed minimum which was payable in cash is extremely small compared to the total amount of the agreed purchase price. It is unthinkable that defendants, having received the deed to the water lands and the sole right to control the operations, should be allowed to cease production without liability for the purchase price, or at the very least, for

the damage caused by their repudiation and abandonment.

The law respecting the subject matter appears clear. In *Acme Oil and Mining Co. v. Williams* (1903), 140 Cal. 681, at 684, the court said:

> "It is insisted by the appellant that no covenant in the lease was broken, because the two wells provided for were sunk within the required time, and royalty for such oil as was shown to be produced was paid. These, however, were not all the covenants of the lease. Covenants may be implied, as well as express, and in oil leases, and others of that particular character, where the consideration for the lease is solely the payment of royalties, there is an implied covenant, not only that the wells will be sunk, but that if oil is produced in paying quantities they will be diligently operated for the best advantage and benefit of the lessee and lessor.
>
> The sole consideration usually moving the lessor in extending oil leases is, and the only consideration for the particular lease involved here was, the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties, to the extent that the product may be secured and disposed of, and when the only consideration for the lease is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production."

To the same effect is *Jones v. Inter-State Oil Co.* (1931), 115 Cal. App. 302.

While it is true that the above cases deal with leases in which the *sole* consideration to the lessor is the agreed royalty, neither in reason nor in case law is the rule limited to situations in which the sole consideration is royalty.

In *Hartman Ranch Co. v. Associated Oil Co.* (1937), 10 Cal. 2d 232, at page 239, the court said:

> "Where express covenants do not cover completely all phases of the lessee's obligation in regard to exploration, development and protection, implied covenants may coexist with express covenants. Since the consideration for such leases is entirely *or in large part* the oil royalty payments to be made to the lessor, such covenants must be implied to protect the lessor and carry out the purpose of the lease."
>
> . . . "We conclude on this branch of the case that in the circumstances shown there was an implied covenant in the Hartman lease requiring protection from drainage through operations on adjoining land by the party in possession of the Hartman leasehold." (at p. 242.)

See also: *Sauder v. MidContinent Petroleum Co.* (1934), 282 U.S. 272, 78 L. Ed. 1255; *Rehart v. Klossner* (1941), 48 Cal. App. 2d 40.

In *Lippman v. Sears Roebuck* (1955), 44 Cal. 2d 136, the lease provided for a monthly minimum rent of $285 together with a percentage of gross sales made from the premises. (*Id.*, p. 139.) The fact that the lease provided for a monthly minimum regardless of the amount of sales did not relieve the tenant of the obligation to continue to carry on its sales on the premises.

Following is from the opinion:

> "As a general rule, it is held that a statement as to the purpose for which premises are leased does not imply a covenant by the lessee that he will engage in that use, but he may cease to use the premises for any purpose. (citation) Some courts have implied such a covenant when the rental for the premises is based upon a percentage of the proceeds from the business for which they are let. (citations) These cases rest upon a theory of interpretation similar to that employed in the consideration of 'output' contracts, where the courts have found 'from the business situation, from the conduct of the parties, *and from the startling disproportinate burden otherwise cast upon one of them,* a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party. . . .' (1 Williston on Contracts [rev. ed. 1936], §104A, pp. 357-358.)" (at pp. 142-143.)

It should be borne in mind that the present case is not one in which defendants in good faith erred in determining whether further development was commercially feasible; on the contrary, the evidence is that defendants abandoned development for the purpose of putting economic pressure on the plaintiffs and in effect abandoned the contract.

Following are pertinent excerpts from the transcript: Marron, *defendants'* witness, testified:

"THE COURT: Do you know how much water they will produce now, or do you know how much water they are actually producing?

THE WITNESS: Well, they haven't produced water, from the information that I determined the other day, for 2 years, but at that time they were producing 75 gallons per minute." [Rep. Tr. Vol. 1, p. 118, lines 9-15.]

"Did you say there is no production from the well?

THE WITNESS: That is correct. Not to my knowledge." [Rep. Tr. Vol. 1, p. 132, lines 4-5.]

"MR. SCHWARTZ: I might state to your Honor that the purpose of these questions is not to try the case, but they deal with the question of the propriety of the conduct of Mr. Murchison and Simi Valley Development Company, which would estop them from demanding arbitration. That is the purpose of the question and I believe I am completely correct on that.

THE COURT: Let's have the question now.

(The question was read by the reporter as follows: 'Q. Now, Mr. Marron, how long has the Metropolitan Water District been supplying water to Susana Knolls Water Company?')

THE COURT: If the witness knows, I will allow him to testify.

THE WITNESS: Approximately 2 years." [Rep. Tr. Vol. 1, p. 140, line 15, to p. 141, line 4.][15]

[15]The above testimony was given in March of 1965.

Reiss, one of the plaintiffs, testified:

"Q. Mr. Riess, did you, prior to September 13, 1955, develop or drill for water on your water lands? A. I originally drilled for water there in 1936 and brought in what is known as the home well. Then I drilled, with the extreme water shortage in 1950, when the whole community was out of water, a well known as No. 1 or 0, often referred to, and supplied the whole community for 5 years with water free of charge during all that period. Then I had two wells, and in 1952 I drilled No. 2 well, the large one.

THE COURT: The No. 2 well was the large well?

THE WITNESS: The large one, yes, sir. No 1 was 1200 gallons and I operated that for about three and a half years with electric power.

THE COURT: The home well was drilled in what year?

THE WITNESS: 1936.

THE COURT: And No. 1?

THE WITNESS: No. 1 in 1950, the driller moved in in January.

THE COURT: And No. 2 was drilled when?

THE WITNESS: Completed in October 1952." [Rep. Tr. Vol. 2, p. 192, line 17, to p. 193, line 3.]

"Q. Mr. Riess, you say you pumped it for a week with the 14-inch bowls? A. The second time.

Q. The second time, and what was the production of the well? A. Again, because of a Diesel having been available, we could vary the speed

over and above the safe maximum velocity of the pump, and when we run her up to 2000, we had 2200 gallons output from the well. That, however, was only temporary, usually about 30 minutes, until the motor began to heat up. Then we steadied it down between 1750 and 1800.

THE COURT: You mean 1750 gallons?

THE WITNESS: Per minute, to 1800." [Rep. Tr. Vol. 2, p. 196, lines 3-16.]

"THE COURT: You say Mr. Murchison was personally present?

THE WITNESS: Oh, yes, Mr. Murchison was there.

THE COURT: When you made the test in 1955?

THE WITNESS: Yes, sir. He had me run the test for him and he had a half-dozen engineers with him.

THE COURT: At the time you ran this test for Mr. Murchison, what was the production of the well?

THE WITNESS: 1800 to 2000. We varied here. We opened her up full blast.

THE COURT: We are talking about No. 2 well?

THE WITNESS: No. 2 well, sir." [Rep. Tr. Vol. 2, p. 199, line 24, to p. 200, line 10.]

"Q. Was there anything done to change the physical condition of that well? A. Not No. 2, except a pump was later—not at that time, no. Later that happened.

Q. Well, at any time. A. Oh, yes, later on they pulled the big pump.

Q. Now, when was that done, do you know? A. In 1957, the latter part, or 1958.

Q. Do you know what was done to the Well No. 2? A. Yes. They pulled out the big pump, they took away my gear head and my big motor. They installed a half-capacity horsepower, 150 maximum capacity, transformer unit and motor, found out that that motor could never operate that big pump, pulled it and put a half-uze pump in and set it at 85 feet lesser depth, and called that a test." [Rep. Tr. Vol. 2, p. 207, line 22, to p. 208, line 11.]

"Q. Mr. Riess, I call your attention to Riess Well No. 1, which you previously testified was completed in 1950 and was producing 1200 gallons per minute. I will ask you to state whether that well, Reiss Well No. 1, was tested after 1952.

THE COURT: Before we get into that, can you tell me when Riess Well No. 1 was drilled?

THE WITNESS: 1950.

THE COURT: At the time the drilling was completed, did you make a test?

THE WITNESS: Yes, repeated tests.

THE COURT: How much water did the tests show Well No. 1 could produce?

THE WITNESS: We pumped 1200 gallons on a test run for numerous days with a Diesel engine." [Rep. Tr. Vol. 2, p. 228, lines 11-25.]

"Q. Mr. Riess, subsequent to 1954, were any tests made of Riess No. 1? A. Yes, sir.

Q. Were you present? A. Yes.

Q. And can you state who made the tests? A. Mr. Spence, a Murchison engineer.

Q. And when was that? A. Sometime in 1954—I would have to guess, if I say it was April or it was May—I do not know, because he came back again later.

Q. Was anyone else other than Mr. Spence there? A Mr. Acton and Mr. Guy Mann of Dallas.

Q. And you were present? A. Oh, yes.

Q. Did I understand you to say Mr. Spence was one of the engineers for Mr. Murchison? A. Yes. He worked under Clifford Smith and the Delhi-Taylor engineer, geologist.

Q. Did the test pumping made at that time indicate what the well production of the No. 1 was? A. Right, at that time, prior to the change of the pump.

Q. What's that? A. Prior to the change of the pump.

Q. What was the production? A. 1000 gallons. She was geared to an electric motor and it couldn't be different." [Rep. Tr. Vol. 2, p. 232, line 14, to p. 233, line 16.]

"A. After the second agreement was signed, the Dallas people moved back in and pulled the pump on No. 1 in order that, according to Murchison's instructions, the well could be deepened to 800 into the same fissure that the huge No. 2 supply came from and a larger pipe installed in the hole to accommodate an equally large pump as we had in No. 2.

Q. Was a deepening undertaken? A. No, it was pulled and the well was deepened from around 440 to 800 by Hall Drilling Company.

THE COURT: You said 440. You mean 440 feet?

THE WITNESS: 440 feet.

THE COURT: To 800 feet?

THE WITNESS: To 800 feet.

. . .

Q. Mr. Riess, will you state to the court what happened when the deepening of No. 1 was undertaken? A. When No. 1 was driven below the 600 feet from the original bottom, new hole was made, we encountered a large fissure in which the drill stem, the bit on the stem that does the drilling, broke loose and buried itself partially in the crevice, or in the fissure. Then they proceeded to try to fish it, for several weeks worked around the clock, but they could not release it because it had been in on a 45 degree angle, and weighing maybe 3000 pounds. It was a big bit, star bit.

When finally the order was given by Mr. Adams to Mr. Hall to shoot it in the hole and keep going down, so they put a lot of dynamite in the hole. I talked to Mr. Adams about it and he said, 'Well, we bought you out. This is our business.'

And they did shoot that bit in and it went down to 800 foot.

Q. Was anything done to the well after that? A. No. Then he moved the same drill rig on No. 8." [Rep. Tr. Vol. 2, p. 234, line 23, to p. 236, line 11.]

"THE WITNESS: Then I asked Mr. Adams to please put the casing down to bottom so we don't lose the well.

He said, 'We don't need that well. We have plenty already. They are going.'

BY MR. SCHWARTZ:

Q. Was there a pumping unit installed in that well—

. . .

Q. Was that taken out again? A. Oh, yes.

Q. To your knowledge, was that pumping unit at any time put back into the hole, or any pumping unit? A. No. It was capped.

THE COURT: When was it capped?

THE WITNESS: Right about that time, sir.

THE COURT: Well, when was that?

THE WITNESS: I would say within 2 hours after the pump was out, because it was too close to the street for kids to fall in.

THE COURT: What year was that?

THE WITNESS: In September 1956.

THE COURT: It has remained capped since that time?

THE WITNESS: Yes, sir." [Rep. Tr. Vol. 2, pp. 237-238.]

"Q. Mr. Riess, was that Well No. 3 tested after it was completed?

THE COURT: You mean after it was re-drilled?

MR. SCHWARTZ: Redrilled, yes, your Honor.

THE COURT: All right.

THE WITNESS: That is correct. It was tested after drilling, or redrilling, you call it." [Rep. Tr. Vol. 2, p. 237, line 10, to p. 240, line 2.]

"Q. Mr. Riess, after the completion and testing of Riess No. 3 after it was redrilled in 1956, was

there anything done to that well? A. It was capped, covered over, and a flower bed set on it." [Rep. Tr. Vol. 2, p. 242, lines 21-25.]

"Q. To your knowledge, was any pumping unit installed afterwards? A. A little later, a year later or so, a little domestic unit was installed. It was reopened and a little domestic unit was put in, because my huge pump and Diesel was just impossible to use.

THE COURT: Reopened? Was that in 1957?

THE WITNESS: 1957 or 1958." [Rep. Tr. Vol. 2, p. 243, lines 14-21.]

"Q. I will ask you this. Was that Riess No. 3 redrilled, after it was redrilled was it bailed? A. No, no, no. We knew we had more water than we could bail. It was immediately put on the pump.

Q. Were you there when it was put on the pump? A. Yes. I observed the pumping. Not the whole 24 hours round, but daily." [Rep. Tr. Vol. 2, p. 246, lines 15-21.]

"Q. Mr. Riess, was Riess No. 4 cased? A. No, never completed nor cased." [Rep. Tr. Vol. 2, p. 252, lines 24-25.]

"THE COURT: All right. May I ask another question? What happened to it? Was it capped?

THE WITNESS: Oh, yes, they capped it. There was liability from kids falling down or something." [Rep. Tr. Vol. 2, p. 254, lines 7-10.]

"Q. To your knowledge, Mr. Riess, that well ever since it was drilled in, I believe you said August or September, 1956, No. 4, has it ever been.

and since it has been capped, ever been pumped? A. No.

Q. And has any installation been made of any pumping unit or equipment in that well? A. No, sir." [Rep. Tr. Vol. 2, p. 255, lines 2-9.]

"Q. Did Mr. Adams ask you to talk to Mr. Cobb? A. Mr. Adams asked me to talk to Mr. Cobb.

Q. Did you talk to Mr. Cobb on the subject relating to the activity of the wells, Reiss Wells 1, 2 and 3? A. I did.

Q. When? A. Right a day or two after the Adams discussion with me when he said, 'We are satisfied. We are quitting all further development.'" [Rep. Tr. Vol. 3, p. 296, line 18, to p. 297, line 1.]

"[The Witness] . . . I asked Mr. Cobb to please see that the No. 1 well is at least cased before it is capped, so it doesn't get lost.

BY MR. SCHWARTZ:

Q. Is that all the conversation? A. Well, we were talking a long time. He said, 'We don't care for any more wells. We have all the water we need. We are in the process of selling and it is up to the new man, the new owner, to take on any further well drilling obligations if he wants to develop more water.'" [Rep. Tr. Vol. 3, p. 300, lines 11-20.]

"THE WITNESS: Mr. Costin did the speaking.

THE COURT: Mr. Who?

THE WITNESS: Mr. Costin, c-o-s-t-i-n. He was president of the company then.

THE COURT: President of what company?

THE WITNESS: Simi Valley Development Company.

BY MR. SCHWARTZ:

Q. Do you know his first name? A. Glen.

Q. Just state what was said regarding a threat. A. I was just told that they made a bad deal with Manley, they are getting the property back and I got to make a new deal with them, or else I get nothing, *they will sit on it, wait until the Metropolitan comes in,* and then I am boxed in, my wells wouldn't be worth anything and I am out. They told me that and my wife." [Rep. Tr. Vol. 3, p. 309, line 21, to p. 310, line 11.] (Italics ours.)

Attention is directed to the letter of defendant Simi Valley Development Company (attached to the Declaration of Stephan Riess), commencing at Clerk's Transcript page 65, in which that defendant stated what it would do, and added:

"You would quitclaim all rights, title and interest in any stock of Simi Valley Development Co.

The water requirements of the residence formerly occupied by you, its appurtenances, would be supplied without cost.

The existing controversy in respect to the $18,000.00 would be disposed of by Simi paying to you the sum of $9000.00 at the time of the execution of the agreement."

The court is respectfully referred to the excerpts from the transcript which are reprinted in this brief under the heading "Respondents Repudiated Their Contract with Appellants and Thus Lost Their Right to Arbitrate."

Appellants further point out that the plaintiffs' quoted testimony was not denied.[16] Indeed, defendants filed no answer, and put on no rebuttal testimony whatever.

On the record below, it is clear that defendants abandoned, as well as repudiated, the contract. The effect of abandonment, with respect to arbitration, has the same effect as does repudiation. If a party to a contract abandons it, he cannot thereafter claim the right to arbitrate under its terms.

In *Banks v. Calstar Petroleum Co.* (1947), 82 Cal. App. 2d 789, at pages 792, 793 the court said:

> "The lease contained the following provision: 'In the event of any controversy between the parties as to any matters of fact arising under this lease, such question of fact shall be submitted to arbitration, and the decision of the arbitrators thereon shall be a condition precedent to the right of action on the lease itself.'
>
> "Appellant contends that two questions of fact arose which required arbitration under the quoted provision of the lease, to wit: what acts were done or not done by appellant which would evidence an abandoment of the lease, and what damages did respondents sustain by reason of the failure of the lessee to execute a quitclaim deed? Fourteen months before respondents gave notice of default appellant had done all that could possibly be done to indicate its abandonment of the lease and its intention to abandon. Its failure to produce oil, its

[16]Certain denials concerning the quantity of water were made by defendant's reply affidavit; but there were no denials that defendants had capped the wells, ceased production, and intended to wait for Metropolitan water to come in.

failure to drill the well to a deeper oil sand, its notice to the Division of Oil and Gas of its intention to abandon, and its plugging the well so as to make it unusable constituted a complete abandonment, thus removing that question from any possibility of arbitration."

The pertinent provisions of the California statute with respect to arbitration (Cal. Code Civ. Proc., Sec. 1281.2), provides as follows:

"On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) *Grounds exist for the revocation of the agreement.*" (Italics ours.)

Hanes v. Coffee (1931), 212 Cal. 777, involved an oil lease containing an arbitration clause. Plaintiff brought suit without submitting to arbitration and had judgment. In affirming the judgment for the plaintiff, the Supreme Court of California said:

"The next contention is that the controversy leading to the present action should have been arbitrated, under the terms of the lease. The provision in the instrument reads as follows:

'Should the parties hereto not agree as to any question of fact affecting the rights of the parties

hereto, such difference shall be settled by arbitration, each party to appoint an arbitrator, and they to appoint a third arbitrator, and the written findings of any two arbitrators to be binding on the parties hereto.'

Conceding that this provision would be enforceable under our statutes, we do not think that it is applicable to the present controversy, in which the lessor contends that by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or if it did, is now terminated. The provision clearly does not contemplate that this question shall be submitted to arbitration, since if the allegations of plaintiffs' complaint are sustained, the result is that the lease, including the arbitration provision, is wholly inoperative, and the lessee can claim no rights thereunder."

C. There Were Partial Breaches of the Contract Coupled With a Total Repudiation; Defendants Have Accordingly Lost All Rights Under the Contract and Cannot Require the Plaintiffs to Comply With Any of Its Terms.

In the former hearing the trial court found, and this court affirmed on appeal, that the defendants committed partial breaches of contract when (1) they paid the sum of $30,000.00 to plaintiff instead of $48,000 which was due during the two years immediately following the consummation date; and (2) that the Buyers breached said contract by failing to pay the Sellers at the contract rate for water produced, saved and sold by them from the waterlands. [See Former Record, Finds.

IV and VI; this court court reversed on the issue of defendants' duty to extend water lines and build reservoirs, but affirmed the breaches with respect to making payment.] These partial breaches were coupled with a repudiation and so constitute a "total breach of contract", justifying immediate action for damages. [The Former Record was before the District Court on the Petition for Arbitration, Rep. Tr. Vol. 1, p. 57.]

4 Corbin on Contracts, Section 954 (1951) states:

> ". . . Suppose next that the contract requires performance in instalments or continues for some period in that there has been such a partial failure of performance as justifies immediate action for partial breach. *If this partial breach is accompanied by repudiation of the contractual obligations, such repudiation is anticipatory with respect to the performance that are not yet due.*
>
> In most cases, the repudiator is now regarded as having committed a 'total' breach, justifying immediate action for the remedies appropriate thereto." (Italics ours.)

The repudiation of the contract by the defendants amounting to a total breach has heretofore been stated.

This evidence showed unequivocally that the defendants had in fact repudiated the contract.

While Murchison and Simi Valley Development Company did in fact commence operations in the pumping of the water, they did not pursue them but stopped

after finding water. [See excerpts from Reporter's Transcript hereinabove quoted.]

In the *Swinerton* case, *supra,* the defendant lessee repudiated by words, *i.e.,* that unless the plaintiff lessor would accept the assignment, they would have nothing further to do with the property or contract. In this case, the defendant purchasers went further. They set conditions upon their performance in violation of the agreement.

Summarizing the argument with respect to defendants' right to arbitrate, appellants urge:

1. The Complaint before the court below was based on defendants' repudiation; the court erred in ordering arbitration; if in fact there was a repudiation by defendants there was no longer any agreement which gave the defendants the right to require arbitration.

2. On the record as made, repudiation was alleged, proved by affidavit and testimony, and was never denied. This court should reverse on the ground of defendant's repudiation.

3. On the record below, it appears without denial that defendants abandoned the contract. This court should reverse the order for arbitration on the ground of defendants' abandonment of the contract.

III.

The District Court Erred in Failing to Make Findings of Fact in Support of Its Order Staying Proceedings.

The order appealed from contained the following:

> "All proceedings in the above entitled action are stayed pending the decision of the arbitrators." [Clk. Tr. commencing at p. 192.]

Appellants urge that this order is tantamount to an injunction.

The point was expressly decided in *Shanferoke C. & S. Corp. v. Westchester Corp.* (1934), 293 U.S. 449, 79 L. Ed. 483. The defendant in a contract suit pleaded an agreement to arbitrate and asked for a stay. The District Court denied the stay; the Court of Appeals reversed and granted the stay. The Supreme Court granted certiorari and affirmed the holding of the Circuit Court saying (at 293 U.S. 451 and 452) that the denial of the stay was equivalent to the denial of an injunction.

The case is directly controlling because Rules 52 and 65(d) of Federal Rules of Civil Procedure make no distinction between granting and denying an injunction so far as the duty to make Findings.

In *Carey v. Carter* (1965, C.A.D.C.), 344 F. 2d 567, the District Court had denied a stay of proceedings, but failed to make Findings of Fact. The Circuit Court of Appeals vacated the judgment and remanded the cause on that ground, saying:

> "The denial of a stay pending exhaustion of contractual grievance procedures was 'in effect an

order denying an interlocutory injunction' and is thus appealable. And since the motion was in effect for an interlocutory injunction, Rule 52(a), FED. R. CIV. P., applied. This rule requires that 'in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.' Here the court's failure to comply with this rule precludes 'a proper review of the action of [the] court.' Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L. Ed. 774 (1940)." (at p. 568.)

Wilco v. Swan (1953, C.C.A. 2d), 201 F. 2d 439, holds that an order denying a stay of proceedings to permit arbitration is equivalent to an order denying an interlocutory injunction. Following is from the opinion:

"Before answering the complaint, Hayden, Stone & Co. moved, pursuant to section 3 of the Federal Arbitaation Act, 9 U.S.C.A. §3, for an order staying all proceedings in the action until an arbitration has been had in accordance with the terms of a margin agreement entered into between the plaintiff and firm of Hayden, Stone & Co. In a carefully reasoned opinion reported in 107 F. Supp. 75, Judge Goddard denied the motion. Hayden Stone & Co. have appealed.

"Although the order is interlocutory, it is appealable, since it is in effect an order denying an interlocutory injunction. Shanferoke Coal & Supply Corp. of Del. v. Westchester Co., 293 U.S. 449, 55 S. Ct. 95, 79 L. Ed. 647." (at p. 441.)

The order here appealed from failed to comply with the requirements of Rule 52(a) and Rule 65(d) of the Rules of Federal Civil Procedure. Those rules state, in part:

> Rule 52: . . . "and in granting or reviewing interlocutory judgments the courts shall similarly set forth the Findings of Fact and Conclusions of Law which constitute the grounds of its action."
> Rule 65: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; . . ."

Rule 52 is explicit; it requires Findings of Fact. Rule 65(d) has been held to require Findings of Fact or statements or recitals at least equivalent to Findings. (See *Sims v. Greene* (1947, C.C.A. 3), 161 F. 2d 87, at p. 89.)

The order here appealed from made no Findings sufficient to comply with the Rules. The Former Record contained Findings of breaches; further evidence of at least partial breach was introduced, together with undenied evidence of repudiation and abandonment, thus constituting a total breach, at least of defendants' obligations which yet remained to be performed. The transcript indicates that the District Court limited its hearing to the consideration of voluntary waiver and estoppel, and perhaps gave no consideration whatever to repudiation or abandonment.

Nevertheless, the order appealed from recited that the defendants are not in default. It is submitted that this is a conclusion of law, and is not a finding of fact; in any event, it is erroneous. The appearance in the order of this conclusion of law is inexplicable in view of the court's repeated statements that it limited its hearing to

issues of waiver and estoppel. [*E.g.,* Rep. Tr. Vol. 5, p. 673, lines 16-20; Vol. 5, p. 556, lines 13-18.]

As has been shown, Findings of breaches were made in the Former Record, and the evidence of defendants' repudiation and abandonment of the contract has not been denied.

The order is further deficient in failing to make Findings of Fact with respect to the issue of repudiation and abandonment alleged in the verified Complaint, in the declaration in opposition to the petition for a stay, and testified to by Marron (defendants' witness) and by Riess, as herein elsewhere in this brief quoted.

As has been pointed out, the conclusion that the defendants are not in default would dispose of the necessity of arbitration, and would make any arbitration meaningless. Defendants have claimed in the proceedings below that arbitration was necessary to determine whether an obligation (presumably to build the reservoirs and extend the pipe lines) existed at all before it could be determined that such a breach had been committed. But a conclusion that the defendants were not in default pre-judges the arbitration and its consequences.

Without wishing to dilute appellants' argument that the evidence showed repudiation and abandonment of the contract by defendants, appellants under this branch of the argument further urge that in any event the order for stay must be vacated for failure to make Findings of Fact.

IV.

In Any Event, the Inclusion in the Order Appealed From of a Statement That Defendants Were Not in Default Was Clearly Erroneous, and the Order Should Be Reversed.

Although the District Court made various statements during the hearing of the Petition for Stay and for Arbitration, it is believed that the following statements of the District Court reflect its ultimate conclusion:

> "THE COURT: So you go ahead. The thing we are interested in now is the question of estoppel, not anything else. If Mr. Murchison or his assigns have not been estopped from demanding arbitration, I am going to have to order arbitration. I am going to have to order it. So the only thing we are interested in now is the question of estoppel." [Rep. Tr. Vol. 4, p. 416, lines 3-8.]

At a later hearing (on March 23, 1965) the court said:

> "THE COURT: In order to raise the doctrine of estoppel against Mr. Murchison, you are going to have to prove that Mr. Murchison made certain statements or agreed to do certain things upon which Mr. Riess relied." [Rep. Tr. Vol. 5, p. 556, lines 12-15.]

Almost at the end of the hearing, Judge Westover said:

> "THE COURT: Now, it may be very true, it may be, Mr. Schwartz, that when they get over this hurdle of arbitration, I may come to the conclusion that there has been an entire repudiation of this contract. I don't know. I am not passing upon that. *That is something for the future.*" [Rep. Tr. Vol. 5, p. 673, lines 16-20.] (Italics ours.)

As has been shown under other headings in this brief, there was clear, undenied, evidence of default, repudiation and abandonment. Judge Westover indicated his state of mind near the close of the hearing, as follows:

> "THE COURT: It seems to me the court could hold that there has been a total repudiation of the balance of the contract, but how in the world the court could hold that there has been a total repudiation of the entire contract, I don't know." [Rep. Tr. Vol. 5, p. 706, lines 12-16.]

In fact, defendants' counsel stipulated that defendants were obligated to pay for all water produced from the wells. [Rep. Tr. p. 512, line 13, to p. 513, line 10.] There is no question but that this obligation to pay for water has never been performed. [See admission of defendants' counsel, Rep. Tr. Vol. 2, p. 297, lines 12-23.]

If appellants are right in their contention that the District Court should have considered the question of the repudiation and abandonment before ordering arbitration, then the order appealed from is erroneous, because it would appear that the District Court considered only the questions of estoppel and express waiver; accordingly the statement in the Order that defendants were not in default is erroneous.

If, however, the court did consider the evidence of defendants' repudiation and abandonment, then the order should be reversed because the conclusion that the defendants were not in default is clearly erroneous. The existence of numerous breaches was not denied, and the Findings of the court in the Former Record have not been altered.

Further, the District Court cannot have intended to exonerate the defendants from all default, because, as has been urged, such a determination would render the arbitration an absurdity. The avowed purpose of defendants' petition for arbitration was to determine the existence or non-existence of the defendants' obligation (to build a reservoir and to extend pipe lines) which plaintiffs claimed defendants had not performed.

In the former hearing the court found that the defendants had breached the contract by failure to pay money for the two year period and by failure to pay for water produced and served. As has been pointed out, these findings were affirmed on appeal to this court. No evidence was introduced by anyone to alter the effect of those findings and affirmation on appeal.

Finally, the Third Amended Complaint alleged numerous breaches, the sale of water lands, as well as total repudiation by defendants. There has been no Answer to the Complaint and, of course, there has been no hearing on the allegations of the Complaint. To allow the court's present order to remain without correction would, in effect, constitute a holding that the defendants were not in default; and such holding would seriously prejudice plaintiffs in a trial on the merits, no matter what the results of the arbitration might be.

Conclusion.

A review of this litigation shows that defendants have had the use of plaintiffs' land for approximately ten years; that although defendants have made some payment, approximately 9/10ths of the agreed purchase price has not been paid. The trial court found defendants were in default in making cash payments under

the contract and also in default in payment for water produced (Opinion, *Riess v. Murchison,* former appeal); the reversal by this court related only to the failure to arbitrate a question of partial performance under Paragraph 3, Exhibit A. (Defendants' obligation to extend water lines and to build reservoirs.)

The Complaint filed after remittur alleged a total breach by defendants, and thus rendered irrelevant the question of arbitration (with respect to performance, under Par. 3), at least until there were a determination of the issue of repudiation.

Appellants must say that they were unable to determine with complete certainty whether the lower court, on the hearing of respondents' Petition for Stay and Arbitration, actually considered the question of repudiation. An examination of the entire transcript leaves appellants with the belief that the District Court did not consider that question, but limited its consideration, at defendants' urging, to issues of waiver and estoppel.

Whether the lower court did so or not, it is clear that the court erred. It should have heard the question of the total breach before hearing the petition for arbitration.

In any event, it should have determined the question of total breach as a defense to the Petition for Stay and Arbitration. The District Court did neither.

The record made on the hearing below requires a finding of total breach. A reversal by this court with instructions to vacate the order for arbitration and stay on the ground that defendants repudiated the contract, would go far toward accomplishing justice, and would

also help dispose of this long, costly, seemingly interminable litigation. However, if this court should believe that it should not give such instructions, this court should in any event reverse the order appealed from on any one or more of the other grounds urged in this brief. Specifically, it appears clear that the issue of repudiation must be determined before the court can consider a petition for arbitration, and if repudiation is found, no arbitration can be ordered.

Respectfully submitted,

MORRIS E. COHN,
Attorney for Appellants.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the Rules.

MORRIS E. COHN

EXHIBIT "A".

28463

September 13, 1955

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

This letter agreement shall serve to evidence and confirm the basic general understandings and agreements entered into between us this date relative to the acquisition by me, or my nominees, designees or assignees (and it is understood that throughout this letter all references to me shall include my nominees, designees and assignees, if any), of certain lands now owned by you and your wife and the water rights pertaining thereto and the water wells situated thereon and the participation by you and your wife and Len Acton and Guy L. Mann, collectively, in the proportion of one-half by you and your wife and one-half by Messrs. Acton and Mann, in (a) the lands or the income and profits therefrom located in Ventura County, California which I have contracted, by contract dated August 26, 1955, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi Valley of California.

Our basic agreements and understandings are in general as follows:

1. You have represented and hereby do represent that you and your wife own good and merchantable title to certain lands in Ventura County, California comprixing approximately 300 lots plus approximately three and one-half acres upon a portion of which there is presently located one or

more wells capable of producing many millions of gallons of commercially pure water (the portion of which lands upon which such well or wells are located are hereinafter referred to as the "Water Lands"), and hereby you agree to convey to me and I agree to purchase from you and your wife all such lands and all other lands owned by you in Ventura County, California, save and except the approximately two acres upon which your home and your domestic well is situated, for the consideration and upon and subject to the terms, provisions and conditions hereinafter set forth. With respect to such excepted lands you shall also assign and convey to me all water rights appurtenant to same save and except such water as may be produced from any well on said excepted lands for domestic uses and with the understanding, however, that I shall not have any rights to the use of the surface of such excepted lands, or any portion thereof, in any operations connected with the water rights appurtenant thereto. I shall have the "first right of refusal" for thirty days at appraised value to purchase such excepted lands in the event you should ever elect or desire to sell or otherwise dispose of same.

2. In consideration for such lands and water rights I agree to:

(a) Grant unto you, your wife, Len Acton and Guy L. Mann, collectively, but in the proportions of one-half to you and your wife and one-half to Messrs. Acton and Mann, a one-third participation in the lands of the net profits therefrom covered by the aforesaid contract between

myself and M. Laurence Montgomery (hereinafter called the "Montgomery Lands") together with a like interest or participation in such other lands as I might hereafter acquire within the said Semi Valley as may be serviced by water from wells now or hereafter located upon the Water Lands. This interest or participation in such lands shall be either in the character of an undivided one-third title to the fee thereof or the right to receive one-third of the net profits to be derived from the operation, development and/or sale thereof or an interest in a limited partnership which would own such lands and in which you, your wife and Messrs. Acton and Mann would be limited partners and I would be the general partner as we may mutually agree upon after due consideration is given to the practicalities of the situation, the legal protection to you, your wife and Messrs. Acton and Mann from the possibility of any dilutions or cutting-off of your rights or equities by virtue of creditor actions, sales to bona fide purchasers or other such occurrences. In any event, however, it is agreed that regardless of the nature or character of the interest and participation of yourself, your wife and Messrs. Action and Mann in said lands or in the net profits therefrom, I shall have full discretionary rights of management, control and disposition of such lands regardless of the character of yours, your wife's and Messrs. Acton's and Mann's said rights and interests therein. Also it is agreed that I shall have the "first right of refusal" for thirty days to acquire the respective

said interests of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, in the event of any proposed sale or other disposition of any portion of any of such interests. If within ninety days from the date hereof we are unable to reach an agreement satisfactory to me as to the nature or character that the rights and interests of yourself, your wife and Messrs. Acton and Mann in and to said lands (i. e. the Montgomery Lands and the additional lands, if any, in the Semi Valley above provided for) is to be, that is to say, whether such rights and interests are to be in the form of an undivided one-third of the fee or the right to receive one-third of the net profits derived from the operation, development and/or sale of such lands or in the nature of a limited partnership interest, then at my option I shall have the right to terminate this agreement in its entirety.

(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a

minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the balance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. In the event I should elect to make payment of any such deficiency in said $24,000 for any accounting year then it is agreed that if for the next accounting year you shall be entitled to receive in excess of $24,000 I shall be allowed a credit for

such amount of the excess for such next accounting year, but not otherwise, up to the amount of the deficiency so paid by me with respect to the preceding accounting year. This shall be on an accounting year to year basis and shall not be cumulative from accounting year to year.

3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract.

4. To secure you in the fulfillment of my obligations under paragraph 2(b) above you shall have a prior lien and deed of trust upon the Water Lands but under such deed of trust I shall be obligated to give you no more than a special warranty of title.

5. (A) With regard to the participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or in the net profits therefrom, as the case may be, any sales, transfers or conveyances to the rights and equities of yourself, your wife and Messrs. Acton and Mann

and any affiliated interest to which same might be transferred shall expressly recognize and agree to honor such rights and equities. The term "affiliated interests" is hereby defined to mean and include all corporations or other business entities owned or controlled by me, the members of my immediate family and the members of their immediate families, all trusts of which I or any member of my immediate family or any member of their immediate families might be a beneficiary and all corporations owned or controlled by any of such persons or trusts.

(B) Neither you, your wife nor Messrs. Mann or Acton shall be personally liable or obligated for any expenses or costs attributable to or incurred in connection with the acquisition, operation, development, maintenance or sale or other disposition of the Montgomery Lands or any of the additional lands in the Semi Valley which might hereafter be acquired and which are covered by the provisions of paragraph 2(a) above, but the participation of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, shall collectively be charged with one-third of all such costs and expenses. In this regard, however, I agree that in the event any unreasonable expenses shall be incurred in connection with or attributable to the operation, development, maintenance or sale or other disposition of such lands, or any portion thereof, the said interest and participation of yourself, your wife and Messrs. Acton and Mann will be charged only with one-third of such amount

thereof as shall be reasonable as determined after giving effect and consideration to all pertinent and relevant factors pertaining to the incurring of any such expenses claimed to be unreasonable.

(C) It is agreed that, anything herein to the contrary notwithstanding, all costs and expenses heretofore incurred or paid to you or for your account by The Murmanill Corporation or Messrs. Acton or Mann attributable to the formation of the deal and transactions contemplated hereby up to but not to exceed $25,000 in the aggregate shall at my option either be deducted from the balance of $950,000 deferred purchase price provided in paragraph 2(b) or shall be charged against and payable out of the first monies accruing and payable to you, your wife and Messrs. Acton and Mann from yours and their interest and participation in the Montgomery Lands. All sums paid or payable to you during or for the first two year period provided for in paragraph 2(b) hereof in excess of the amounts which during such two year period would otherwise be payable to you on the basis of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands shall be charged to the interest and participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or the net profits therefrom or the interest of yourself, your wife and Messrs. Acton and Mann in any limited partnership created in respect of the Montgomery Lands, as the case may be, and shall be repaid by you, your wife and Messrs. Acton and Mann out of the first monies accruing and payable to you from such

interest and participation and to secure such repayment I shall have first lien and assignment upon said interest and participation.

6. It is agreed that I shall have ninety days from the date hereof in which to make, or to cause to be made, an investigation as to the merchantability of your title to the lands herein provided to be purchased by me and of the merchantability of your title to the water rights appertaining to such lands and as to the right of the owner of the Water Lands to exclusively appropriate to his or its own uses and purposes uses and/or to purposes designated by him or it all water that can be produced from wells located upon such lands, and it is further agreed that all obligations on my part hereunder are conditional upon my being satisfied:

(a) that you have good and merchantable title to all lands herein provided to be purchased by me from you and all of the water rights appertaining thereto and to all of the water that may be produced from wells now or hereafter located on the Water Lands; and

(b) that upon my becoming the owner of the Water Lands, I shall have the exclusive right to appropriate to such lawful uses and purposes as I might designate or desire all water that may be produced from wells now or hereafter located upon said lands particularly, but not limited to, the right of dedication of the preferential rights to such water to uses thereof on (or for the benefit of) the Montgomery Lands to the exclusion of all other uses.

With respect to the foregoing I understand that for some time now you have been furnishing from wells located on the Water Lands on a temporary and emergency basis some water to the Santa Susana Mutual Water Company, and it is agreed that you may continue to supply water from such wells to said water company upon a temporary and emergency basis only and upon the condition that such service may be discontinued at anytime upon reasonable notice in no event to be more than ninety days notice.

7. In the event of the consummation of the purchase of the lands herein provided to be sold by you to me, the deed or deeds executed by you and your wife shall contain covenants of general warranty both as to such lands and as to the water rights appertaining thereto. Also by such deed or deeds you shall convey to me without any additional consideration all well equipment, pipe, pumps and other such property now owned by you and used or useful in the operation and maintenance of the wells now located on the Water Lands and in the drilling of additional wells.

8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b). If I should exercise the

rights accorded me under this paragraph I shall have the right to salvage and remove from the Water Lands all fixtures, improvements and personal property located thereon owned by me. Also if I should exercise such rights I shall not be responsible or liable to you for the condition of any wells located on said Water Lands.

9. It is agreed and understood that this letter agreement is intended only to reflect and record in general our basic and general understandings and agreements with respect to the subject matter hereof, and we each agree, therefore, upon any reasonable request by the other to make and enter into such further and additional more formal written contracts as may be necessary or desirable to more effectually carry out, reflect and record the true intentions and purposes of this agreement.

10. As set forth above, all references herein to myself shall also include any nominees or designees of mine and the agreements herein contained on my part shall be binding upon and shall inure to the benefit of my heirs and assigns, it being expressly contemplated by me that I will assign my rights and my obligations hereunder to an affiliated interest (as that term is hereinabove defined). By the same token, it is agreed and understood that all references to you herein shall also include your wife and the agreements herein contained shall be binding upon you and your wife and yours and your wife's respective heirs, representatives and assigns.

11. For the purposes of the investigations provided for in paragraph 6 above, you agree to make

available to me or to my representatives all data and information that you may possess or to which you may have reasonable access pertaining to the matters provided for in said paragraph 6 and also to make yourself available at reasonable times and upon reasonable notice for conferences and discussions as to such matters, however, if any expenses are incurred by you in connection therewith I will bear and pay same or will reimburse you therefor.

12. During the past several weeks representatives of mine have made certain examinations of and tests with respect to the wells presently located on the Water Lands and you acknowledge that such examinations and tests have not in any manner damaged such wells. Also it is agreed that during the period provided for in paragraph 6 hereof representatives of mine may make further and additional tests of and with respect to the wells presently located on the Water Lands and it is agreed that I shall not be liable to you for any damage occasioned to any of said wells by any such tests provided you agree in advance as to such tests and further provided that my representatives do not conduct same negligently.

If the above and foregoing adequately and accurately reflects your understanding of the basic and general agreements and understandings between us regarding the subject matter hereof, please sign and have your wife sign the copy hereof handed you herewith and return such copy to me where upon this letter shall become and constitute a binding contract between us in accordance with the terms hereof.

Very truly yours,

/s/ C. W. Murchison

The above and foregoing is hereby approved and accepted as of the 14th day of September, 1955.

28463. Recorded at Request of Stephan Riess at 45 Min. Past 3 P. M. Official Records Ventura County.

Jul 9—1958 Book 1633 Page 416.
Olivia Montano Recorder $12.40.

/s/ Stephan Riess
/s/ Thelma Riess
(wife of Stephan Riess)

INDIVIDUAL ACKNOWLEDGEMENT

State of California County of Santa Barbara ss.

On this 9th day of July 1958, before me, J. E. Turner, a Notary Public in and for said Santa Barbara County, personally appeared Stephan Riess and Thelma Riess known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

Witness my hand and official seal.
/s/ J. E. Turner

Notary Public in and for said Santa Barbara County and State. My commission expires October 17, 1959.

Recorded and compared, Olivia Montano, Recorder, by /s/ James A. Amarine Deputy.
(Seal)

EXHIBIT "B".

Dallas, Texas
June 12, 1956

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

As has been previously suggested to you, I propose that we amend and supplement our Letter Agreement of September 13, 1955 in the following respects:

(a) You and Mrs. Riess shall immediately execute and deliver to me, and I shall accept, a general warranty deed covering the lands referred to in said Letter Agreement as the "water lands," together with all wells, water rights and other improvements and appurtenances thereon, which said lands are described in Exhibit A attached hereto. The monies which I have previously caused to be paid to you, aggregating the sum of $78,000.00, is, and shall be, of course, a credit on the purchase price of said water lands and other properties.

(b) I shall pay, or cause to be paid, to you and Mrs. Riess an additional $25,000.00 in consideration for which you and Mrs. Riess shall execute and deliver to me a general warranty deed covering your homesite and all other lands which you and she, and either of you, own in the area of your homesite and the Simi Valley.

(c) In further consideration of the above mentioned additional $25,000.00 to be paid you for your homesite and other lands, you shall, upon my request, make locations for Well No. 3 adjacent to

the present Wells 1 and 2, and for a well in the McGrath Bowl on the Montgomery lands and for any other well or wells that I may desire within a radius of three (3) miles of said present wells.

(d) Paragraph 2(a) of the aforesaid Letter Agreement shall be stricken in its entirety and all other provisions of the Letter Agreement relating to the interests or undivided profit rights of yourself and Mrs. Riess and Messrs. Len Acton and Guy Mann in the Montgomery lands and in other lands to be acquired by me in the area shall be eliminated and you and Mrs. Riess and Mr. Acton and Mr. Mann shall surrender all of such rights and interests in consideration of the transfer to each of you of 1/12th of the common stock of Simi Valley Development Company.

(e) That portion of Paragraph 2(b) which provides that in certain situation or contingencies you will have a right to receive water at the rate of 20¢ per gallon shall be changed to provide that the rate shall be 20¢ per 1,000 gallons.

(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, as contemplated in Paragraph 3 of the Letter Agreement, that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final.

(g) Paragraph 4 which provides that you shall have a lien and deed of trust to secure the perform-

ance of my obligations under Paragraph 2(b) be eliminated but I shall remain liable for the payment to you as provided by the Letter Agreement, as here amended.

(h) It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, in my opinion, the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint.

(i) Paragraph 5(c) shall be eliminated, but in lieu thereof it shall be understood and agreed that all monies which have been expended and which may hereafter be expended by the Murmanill Corporation, directly or indirectly, in connection with the acquisition by me or by my nominees or assignees of any of the properties referred to in said Letter Agreement, or in connection with any title examination thereof or in connection with the testing and reworking of wells, and including engineers' salaries, fees and expenses, and all monies theretofore and which may hereafter be advanced by the Murmanill Corporation to or for the account of Simi Valley Development Company shall be shown as an "account payable" of Simi Valley Development Company.

If these proposed amendments and supplements are acceptable to you, I agree to cause 1/12th of the common stock of Simi Valley Development Company to be transferred to you and a like amount to Mrs. Riess and to Mr. Acton and to Mr. Mann.

It is my purpose to assign all of my rights in the September 13, 1955 contract and in this amendment to Simi Valley Development Company but it is understood that I shall not be relieved of any of my obligations under said Letter Agreement, as here amended. It is further understood that wherever reference is made to me in said Letter Agreement or in this amendment and supplement, the reference shall also include cover and shall bind and inure to the benefit of the said Simi Valley Development Company and its successors and assigns.

I also agree that if this amendment is accepted, the supplemental letter of September 13, 1955 relative to my right to change the Letter Agreement in such a way as to make the monies received by you take the status of ordinary income rather than that of capital gain shall be cancelled.

Except as hereinabove provided, the Letter Agreement of September 13, 1955 shall stand and is hereby ratified and confirmed.

If the above and foregoing is satisfactory and acceptable to you and Mrs. Riess, and to Mr. Acton and Mr. Mann, it is requested that each of you please sign a copy hereof, having your signature acknowledged, and return the same to me, whereupon this letter shall become and constitute a binding contract between us in accordance with the terms hereof and the provisions hereof immediately effective. This assignment shall be binding upon me and all the parties accepting the same, regardless of the failure or refusal of any other party or parties to accept it.

Yours very truly,

/s/ C. W. Murchison

The above and foregoing is hereby APPROVED and ACCEPTED as of the 18 day of June, 1956.

/s/ Stephan Riess
/s/ Thelma Riess, wife of
Stephan Riess
Len Acton
Guy L. Mann

STATE OF TEXAS, COUNTY OF DALLAS—ss.

On this 18th day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared STEPHAN RIESS and THELMA RIESS known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that the executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Ruth Palmer
Notary Public in and for said
County and State.

STATE OF TEXAS, COUNTY OF DALLAS—ss.

On this 18 day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Murchison, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Jeannette R. Williams
Notary Public in and for said
County and State.

Real property in Ventura County, California, described as follows:

Portions of Santa Susana Valley View Tract No. 1 as per map recorded in book 18 pages 1 to 7 inclusive of Maps, Susana Knolls Annex as per Licensed Surveyor's Map filed in book 4 page 68½ of Record of Surveys of Ventura County, and of any unsubdivided portion of the Rancho Simi in book 3 page 7 of Maps lying within an area in the county of Ventura, State of California, described as a whole as follows:

Beginning at the most southerly corner of parcel 3039 as shown on said Licensed Surveyor's Map and being a point on the boundary of the land described in deed to C. J. McGrath and wife, recorded July 11, 1945, in book 724 page 193 of Official Records, thence,

1st: Northeasterly along the southeast lines of parcels 3039-3038 and 3037 of said Susana Knolls Annex to the southeast corner of said parcel 3037; thence,

2nd: Northerly in a direct line to the southwest corner of parcel 3036 as shown on said Licensed Surveyor's Map; thence,

3rd: Easterly along the southerly line of said parcel 3036 to the southeast corner thereof; thence,

4th: Northerly along the easterly lines of parcels 3036 and 3035 of said Susana Knolls Annex to the southeast corner of lot 1055-A of said Santa Susana Valley View Tract No. 1; thence,

5th: Easterly along the southerly line of said lot 1055-A to and along the southerly line of lot 1054 of the tract last referred to to the southeast corner of said lot 1054; thence,

6th: Northerly in a direct line to an angle point on the easterly line of lot 1050 of said Santa Susana Valley View Tract No. 1; thence

7th: Northwesterly to the most northerly corner of said lot 1050; thence,

8th: Southwesterly in a direct line to the most southerly corner of lot 1049 of said Santa Susana Valley View Tract No. 1; thence,

9th: Northwesterly in a direct line to an angle point in the westerly line of lot 1047 of the last referred to tract; thence,

10th: Westerly to the most northerly corner of lot 1060 of said Santa Susana Valley View Tract No. 1; thence,

11th: Westerly along the northerly lines of lots 1060 and 1060B of Santa Susana Valley View Tract No. 1 to the east line of lot 1191 of Santa Susana Knolls No. 1 recorded in book 19 page 16 to 22 inclusive of Maps; thence,

12th: Southerly to the most southerly corner of said lot 1191; thence,

13th: Southwesterly along the southeasterly lines of the tract last referred to to the most southerly corner of lot 1184 of said tract; thence,

14th: Southwesterly in a direct line to the point of beginning.

EXCLUDING and EXCEPTING therefrom the property vested in Dorothy Rowan which is lots 1060 and 1060A of Santa Susana Valley View Tract No. 1, recorded in Book 19, page 16, Miscellaneous Records of Ventura County.

Said reserved and excepted surface real property is described as follows, to wit:

Lots 3009 to 3015, inclusive, and lots 3033 and 3034 of Susana Knolls Annex, as per map recorded in Book 4, page 68½, Records of Surveys, County of Ventura, California.

16051. Recorded at request of Stephan Riess at 15 min. past 1 p.m. Official Records, Ventura County. April 9, 1957.

Book 1501, page 222, John D. Locks, Recorder fees $760 folio 8. 4715 Foothill Road, Santa Barbara.